Supreme Court, U.S.
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No. 93-1602

In The

Supreme Court of the United States

October Term, 1993

FIRST INTERSTATE BANK OF DENVER, N.A.,

Petitioner,

vs.

O.F. DUFFIELD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Before reaching the question of Court authority under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court must decide the following question:

Did the Court of Appeals "create a new State Law cause of action" as alleged by Petitioner, and is it appropriate for this Court to review the issue?

LIST OF PARTIES

All parties are listed in the caption.

STATUTORY PROVISIONS INVOLVED

Colorado Revised Statutes § 4-1-203 (1992) (Uniform Commercial Code):

> Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

STATEMENT OF THE CASE

Petitioner asserts in its *Statement of the Case* that ". . . . Duffield agreed to an express, immediate and complete assignment to the Bank of all revenues from his mortgaged oil and gas properties." (Pet. brief pg. 2). This is incorrect. As noted by the Court of Appeals, Mr. Duffield retained the right to continue to sell severed hydrocarbons in the ordinary course of his business and he did so, making his loan payments to the Bank from the proceeds. (Pet. app. 8a).

Petitioner's *Statement of the Case* asserts that ". . . . the Bank could, upon notice to the purchasers of Duffield's oil and gas, require those revenues be directed to the Bank." (Pet. brief pg. 2). This is misleading. The agreement also required that notice be given to Duffield of the Bank's intent to seize the revenues. (Resp. app. 1a) which it failed to do until *after* the revenues were seized. The late notice was also a factor noted by the Court of Appeals. (Pet. app. 5a).

Petitioner's *Statement of the Case* asserts that Duffield pleaded a claim "for violation of what he asserted to be a duty of good faith and fair dealing arising under Colorado common law". (Pet. brief pg. 3). Duffield also asserted in the complaint a breach of duty of good faith and fair dealing under Colorado statutory law, the Uniform Commercial Code, Colo. Rev. Stat. § 4-1-203 (1992), upon which the Court of Appeals focused much of its attention. (Pet. app. 6a).

SUMMARY OF ARGUMENT

The Court of Appeals diligently and specifically applied existing Colorado common law and statutory law, and did not create a new Rule of Law.

A simple state law issue is being paraded by Petitioner as a question of federal law by characterizing the problem as one concerning the function of federal courts in deciding state law issues. It is an issue never discussed by the court below, nor raised by Petitioner until Petition for Rehearing in order to position Petitioner for a submittal to this Court.

ARGUMENT

Petitioner asserts two basic contentions in its Petition, both of which are fallacious:

1. Colorado Uniform Commercial Code, Colo. Rev. Stat. § 4-9-502(1) was clearly applicable but ignored by the Court of Appeals, and

2. Colorado common law was overridden by the Court of Appeals and replaced by a novel theory.

I.

APPLICATION OF COLORADO STATUTE.

The Court of Appeals specifically focused upon Colo. Rev. Stat. § 4-1-202. "*Every* contract or duty within this title imposes an obligation of good faith in its performance or enforcement." (Emphasis added by Court of Appeals.) (Pet. App. 6a). The Court of Appeals had very good reason for not applying Colo. Rev. Stat. § 4-9-502(1), (here espoused by Petitioner) since it states "*When so agreed* . . . the secured party is entitled to notify an account

debtor . . . to make payment to him . . . ." (emphasis added). The parties agreed that Duffield would first be given notice before any collection action would be taken by the Bank; something the Bank failed to do. (Resp. app. 1a); thus the statute endorsed by Petitioner was inapplicable.

II.

APPLICATION OF COLORADO COMMON LAW.

The Court of Appeals held that Colorado courts have applied the implied duty of good faith and fair dealing even though the terms of a contract appear to permit one party to act unilaterally and unreasonably, if the action taken is in contravention of the other party's reasonable expectations. The court cited three Colorado appellate cases in doing so: (Pet. app. 7a); *Navajo Freight Lines, Inc. v. Moore,* 463 P.2d 460, 461 (Colo. 1970); *Ruff v. Yuma County Transportation Co.,* 690 P.2d 1296, 1298 (Colo. App. 1984); *Nix v. Clary,* 640 P.2d 246, 247 (Colo. App. 1981). The thrust of Petitioner's criticism is that Petitioner pretends to read those appellate cases somewhat differently than the Court of Appeals. This is hardly a sufficient basis for Petitioner to assert that the Court of Appeals has tried to "alter existing law or to change direction" of state law. *Jackson v. Johns-Manville Sales Corp.,* 781 F.2d 394, 397 (5th Cir.) (en banc), *cert. denied,* 478 U.S. 1022 (1986), or to call the Court of Appeals' action an "innovative theory", *Dayton v. Peek, Stow & Wilcox Co.,* 739 F.2d 690, 694 (1st Cir. 1984), nor to insinuate that the Tenth Circuit adopted "untested legal theories brought under the rubric of state law." *Torres v. Goodyear Tire & Rubber Co.,* 867 F.2d 1234, 1238 (9th Cir. 1989).

III.

NOT THE CASE FOR THE BELATED *ERIE* ISSUE.

The Tenth Circuit issued its decision without advocating any particular view about the duty of courts presented with novel issues of state law; it simply construed and applied state law. Only at the petition-for-rehearing stage, when faced with an adverse Tenth Circuit decision, did the Bank try to set the stage for a certiorari petition by making the belated claim it now advances. This Court has long held that federal questions are not preserved for presentation on certiorari where the Petitioner waits until a Petition for Rehearing (before a State Supreme Court) to present the issue, and where the lower court did not expressly decide the question. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932); *Forbes v. State Council,* 216 U.S. 396 (1910); *Simmerman v. Nebraska,* 116 U.S. 54 (1885).

Not only does the Tenth Circuit opinion not espouse the approach to *Erie* that Petitioner attributes to it, none of the three previous Tenth Circuit opinions cited in the Petition does so either. *See Big Horn Coal Co. v. Commonwealth Edison Co.,* 852 F.2d 1259 (10th Cir. 1988); *Lutz Farms v. Asgrow Seed Co.,* 948 F.2d 638 (10th Cir. 1991); *Weiss v. United States,* 787 F.2d 518 (10th Cir. 1986).

Thus, even assuming that the question presented is worth deciding in some other case, this case is not the proper vehicle; the Court should review a case in which the Court of Appeals had adopted one of the two polar views set forth in the Petition, which would make it unnecessary for the Court to delve into state law as a predicate for deciding that the federal law issue is present.

CONCLUSION

Since the Court of Appeals did not create a new state law cause of action and since this case does not present an *Erie* issue, Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — AGREEMENT

3.5 Status of Assignment. Notwithstanding the other provisions of this Article, the Trustees or any receiver appointed in judicial proceedings for the enforcement of this instrument shall only have the right to receive directly all of the Hydrocarbons herein assigned and the proceeds therefrom immediately upon written notice of its intention to do so to the Mortgagor and to apply all of said proceeds as provided in Section 3.2 hereof. Upon any sale of the Mortgaged Property or any part thereof pursuant to Article V, the Hydrocarbons thereafter produced from the property so sold, and the proceeds therefrom shall be included in such sale and shall pass to the purchaser free and clear of the assignment contained in this Article.